The standing of M/s. Zain & Co. did not appear to have been considered in the High Court and we must also say, in this court, but the case was argued at both levels on the basis that M/s. Zain & Co. had some standing of sort. The point was not taken before us and did not appear on the record. It was only discovered after an inspection of the court file.

In his judgment, the learned judge considered that the application to set aside for irregularity was not made within a reasonable time as it should have been done and he declined to exercise his discretion in favour of the application. He also thought that the dismissal of M/s. Rithaudeen and Aziz's application, which was by consent, led to the conclusion that the appellants had waived the irregularity.

It seemed to us, however, that the question of the propriety of the service of a writ issued for service within the jurisdiction of the court on Mr. Innis, the manager and duly appointed agent of the Swiss firm must be considered in relation to Order 9 rule 8A of the Rules of the High Court, 1957, a local rule which has no exact parallel elsewhere. It reads as follows:

"(1) In an action relating to any business or work against a person who does not reside in the Federation, or who is absent from the Federation, service of a writ of summons for service within the jurisdiction on any manager or agent, having at the time of service personally the control or management of such business or work for such person within the Federation, shall be deemed sufficient service whether such person is a citizen of the Federation or a subject of any of the Rulers or not."

As has been noticed, this is a purely local rule and undoubtedly it has particular reference to chettiar moneylending business in this country carried on by principals resident in India through local agents who more often than not are themselves principals in other transactions of a similar nature. Hill Ag. C.J. in *Ramanathan Chettiar & Anor.* v. *Sivagami Achi*[1] observed that this rule was "a deliberate departure from the English practice and (this was) done to meet the needs of local business." But undoubtedly it has wider applications and clearly the rule is framed as not to be limited to chettiar money-lending businesses.

In *William Heinemann Ltd. & Donald Moore Ltd.* v. *G.N. Christie,*[2] Thomson C.J. in his judgment observed at page 101 that "like all provisions relating to constructive service, (this rule) has to be read in the light of the general principle that a defendant must be informed that proceedings have been commenced against him. Such provisions are intended to ensure that when information cannot be conveyed to the defendant directly such steps are taken as experience shows will probably have the effect of bringing the information to his notice. Read in that light it would seem necessary to bring a case within Order 9 rule 8A that at the very least the relationship between a defendant and the person having management or control of his work or business as manager or agent should be such that the manager or agent should be under some obligation to bring service of a writ to the notice of his employer or principal."

It falls to be observed that in the numerous affidavits filed in this application, it has been nowhere contended by the Swiss firm that it was under no obligation of any sort to bring service of this writ to the notice of the German firm, or that the German firm was never advised by the Swiss firm's agent in Kuala Lumpur of the issue and service of the writ. On the other hand, the correspondence entered into between Mr. Thomas W. Prunk and his successors in office on behalf of the Swiss firm in Malaysia made constant and repeated references to "our Hamburg office" and in one instance to "those machines purchased through us." This correspondence referred to the defects in these machines which gave rise to the complaints of the respondents and to the action they took and which showed quite clearly that the complaints were in each case referred to Hamburg since they conveyed the "reaction" of "our Hamburg office" and the rejection of the respondents' claim by the German firm. The Swiss firm as the local agent clearly had this "obligation" in respect of complaints and by extension in respect also of the issue and service of the writ.

It remains to consider whether the Swiss firm has "the control or management" of the business of the German firm. The Court of Appeal in the *William Heinemann's* case had approved of the test in *Saccharin Corporation Ltd.* v. *Chemische Fabrik von Heyden Aktienesellschaft,*[3] of whether the defendants' agent within the jurisdiction had powers to enter into contracts on their behalf and the other test laid down in *Okura & Co. Ltd.* v. *Forsbacka Jernverks Aktiebolag*[4] of whether the defendants were doing business within the jurisdiction by a person and not through him. On either of these tests, the Swiss firm was clearly an agent within the jurisdiction and the conclusion is inevitable that the service was good and proper service.

For these reasons, the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Zain & Co.; Kean Chye & Sivalingam.*

HUSDI v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya) & Lee Hun Hoe C.J. (Borneo)) February 25 & March 27, 1980]

[Kuala Lumpur — Federal Court Criminal Reference No. 1 of 1979]

Criminal Law and Procedure — Statements made in the course of police investigations — Whether accused entitled to copies of statements — Impeaching credit of witness — Evidence Act, 1950, ss. 145 and 155(c).

Evidence — Cross-examination as to previous statements — Impeaching credit of witness — Whether accused entitled to copies of statements — Evidence Act, 1950, ss. 145 and 155(c).

In this case the following questions of law of public interest were referred for the decision of the Federal Court —

"(1) Whether a person charged with a criminal offence or offences triable summarily before a subordinate court is entitled in law at any, and if so, at what stage after his arrest to obtain copies of statements of witnesses recorded by the police in the course of investigations under Section 112 of the Criminal Procedure Code.

(2) Whether a person charged with a criminal offence or offences is entitled to obtain a copy of a statement made

by him to a police officer under the provisions of Section 112 of the Criminal Procedure Code."

It was argued that the accused is entitled to a copy of the statement of a witness when it is sought to impeach the credit of the witness.

Held: when a prosecution witness is being cross-examined and the defence seeks to impeach his credit, the court should at the request of the defence refer to his police statement, and may then, if the court thinks it expedient in the interest of justice, direct the defence to be supplied with a copy.

Cases referred to:-

(1) *Muthusamy* v. *Public Prosecutor* [1948] M.L.J. 57.

(2) *Husdi* v. *Public Prosecutor* [1979] 2 M.L.J. 304.

[The following cases were also cited in argument:- *R.* v. *Bryant & Dickson* (1946) 31 C.A.R. 146; *Teh Lee Tong* v. *Rex* [1956] M.L.J. 194; *Chandrasekeran & Ors.* v. *Public Prosecutor* [1971] 1 M.L.J. 153; *R.* v. *Clarke* (1930) 22 C.A.R. 58, 59-60; *Mahadeo* v. *R.* [1936] 2 All E.R. 813; *Mohamed Fiaz Baksh* v. *Queen* [1958] A.C. 167; *Methuram Das* v. *Das* v. *Jaggannath Das* (1901) I.L.R. 28 Cal. 794; *Martin Rhienus* v. *Sher Singh* [1949] M.L.J. 201; *Emperor* v. *Rasulbux & Ors.* A.I.R. 1942 Sind 122; *Natha Apparao* v. *N.S. Rao* A.I.R. 1951 Mad. 864; *Bong Nyi Moi* v. *Narayanasamy* [1973] 1 M.L.J. 250; *Datuk Haji Harun bin Haji Idris* v. *Public Prosecutor* [1977] 2 M.L.J. 155, 158, 170; *Khoo Siew Bee & Anor.* v. *Ketua Polis, K.L.* [1979] 2 M.L.J. 49; *Anthony Gomez* v. *Ketua Polis, Kuantan* [1977] 2 M.L.J. 24; *Queen-Empress* v. *Arumugam* I.L.R. 20 Mad. 189; *Isab Mandal* v. *Queen Empress* I.L.R. 28 Cal. 348; *Sunil Kumar Datta* v. *State of West Bengal* A.I.R. 1963 Cal. 431; *Dawkins* (1875) L.R. 7 H.L. 744; *Goffin* v. *Donnelly* (1881) L.R. 6 Q.B.D. 307; *Dewan Singh* v. *Emperor* (1883) I.L.R. 10 All 425; *Queen Empress* v. *Govinda Pillai* (1892) I.L.R. 16 Mad. 235, 238; *State of Madras* v. *Krishnan* A.I.R. 1961 Mad. 92, 96; *Conway* v. *Rimmer* [1968] A.C. 910.]

FEDERAL COURT.

Sri Ram for the applicant.

Mah Weng Kwai (Deputy Public Prosecutor) for the Public Prosecutor.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): This is a reference under section 66(1) of the Courts of Judicature Act No. 7 of 1964 reserving for our decision the following questions of law of public interest:

"(1) Whether a person charged with a criminal offence or offences triable summarily before a subordinate court is entitled in law at any, and if so, at what stage after his arrest to obtain copies of statements of witnesses recorded by the police in the course of investigations under section 112 of the Criminal Procedure Code.

(2) Whether a person charged with a criminal offence or offences is entitled to obtain a copy of a statement made by him to a police officer under the provisions of section 112 of the Criminal Procedure Code."

At first blush this was an attempt by Encik Sri Ram, counsel for the applicant ("accused"), to obtain copies of statements made by witnesses for the prosecution ("police statements") in advance of the trial — pretrial discovery, as in a civil trial.

But during the course of arguments he narrows down the scope of the questions and says that all he is interested in is this: a witness called by the prosecution is in the box being cross-examined. Counsel applies for a copy of his police statement in order to impeach his credit under section 145 of the Evidence Act ("the Act"). Encik Sri Ram contends that counsel is entitled to a copy.

Section 145 of the Act reads:

"145(1) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without such writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

Section 155(c) is also relevant. It reads:

"The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him —

(c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."

If such an application had been made when the old section 113(ii) of the Criminal Procedure Code ("the Code") was in force, then, the court, if it thought it "expedient in the interest of justice", might direct counsel for the accused to be furnished with a copy.

That section 113(ii) read (omitting irrelevant words):

"When any witness is called for the prosecution, the court shall, on the request of the accused, refer to any statement made by such witness to a police officer in the course of police investigation, and may then, if the court thinks it expedient in the interest of justice, direct the accused to be furnished with a copy thereof, and such statement may be used to impeach the credit of such witness in the manner provided in the Evidence Enactment."

But the old sub-section (ii) has been deleted from the new section 113 of the Code introduced by the Criminal Procedure Code (Amendment and Extension) Act — Act 324.

Nevertheless in our view as sections 145 and 155(c) of the Act have not been repealed, they must be given effect to, and cannot be treated as dead letters. Otherwise, counsel who has a hunch that a prosecution witness has in his oral evidence departed from his police statement may not be able to take advantage of the Evidence Act which allowed — and still allows — the defence to impeach his credit. Also, in the interest of justice the court would want to know if a witness has departed significantly from his police statement.

Encik Sri Ram cites section 5 of the Code, which provides that where there is a lacuna in our law relating to criminal procedure, the court should apply English law, in so far as the same shall not conflict or be inconsistent with the Code and can be made auxiliary thereto. He then cites various English authorities showing that in the circumstances set out in the questions as narrowed down, the proper course is for the prosecution to supply a copy of the witness's police statement to the defence, direct, *without* the intervention of the court. This is in contrast to the procedure under the old section 113(ii), under which there were two steps when the defence made a request:

step 1 — the *court* referred to the statement, and

step 2 — the court directed the counsel for the accused to be furnished with a copy of the statement, if the court thinks it expedient in the interest of justice.

We are of the opinion that when the defence wants to impeach the credit of a prosecution witness, it *is* entitled to a copy of his police statement; not, however, directly as in England, but, as under the old section 113(ii), i.e. *after* the court has seen it and

"thinks it expedient in the interest of justice" to order a copy to be supplied. This expression has been lucidly explained by Taylor J. at page 58 in *Muthusamy* v. *Public Prosecutor*[1] and we reproduce the relevant passage below:

"The proper way to apply the sections is this. On the request of either side, the court reads the former statement. If there is no serious discrepancy, the court so rules and no time is wasted. The first necessity is to read it with the confident expectation that it will be different from the evidence but looking judicially to see whether the difference really is so serious as to suggest that the witness is unreliable.

Differences may be divided into four classes:—

(a) Minor differences, not amounting to discrepancies;

(b) Apparent discrepancies;

(c) Serious discrepancies;

(d) Material contradications.

Minor differences are attributable mainly to differences in interpretation and the way in which the statement was taken and sometimes to differences in recollection. A perfectly truthful witness may mention a detail on one occasion and not remember it on another. A mere omission is hardly ever a discrepancy. The police statement is usually much briefer than the evidence. Both the statement and the evidence are usually narratives reduced from question and answer. The witness is not responsible for the actual expressions used in either, and all the less so where he does not speak English.

If the police statement gives an outline of substantially the same story there being no apparently irreconcilable conflict between the two on any point material to the issue, the Magistrate should say at once, 'The difference is not such as to affect his credit' and hand the statement back.

If, however, the difference is so material as probably to amount to a discrepancy affecting the credit of the witness, the court may permit the witness to be asked whether he made the alleged statement. If he denies having made it, then either the matter must be dropped or the document must be formally proved, by calling the writer or, if he is not available, by proving in some other way that the witness did make the statement.

If the witness admits making the former statement, or is proved to have made it, then the two conflicting versions must be carefully explained to him, preferably by the court, and he must have a fair and full opportunity to explain the difference. If he can, then his credit is saved, though there may still be doubt as to the accuracy of his memory. This procedure is cumbersome and slow and therefore should not be used unless the apparent discrepancy is material to the issue."

We do not think that the prosecution should supply copies of the police statement direct to the defence without the intervention of the court — because of the peculiar circumstances prevailing in this country. Malaysia is a small country, with a small population, and Malaysians are easily scared; they are reluctant to be involved. If a crime is committed under their nose they look the other way, see, hear and say nothing, do little or nothing to help identify — let alone — arrest the offender, and yet complain that the police do not catch criminals and that courts are bedazzled by technicalities. If the prosecution is obliged to supply copies of police statements to the defence without the intervention of the court, the defence may be tempted to ask for, and the prosecution will be obliged to supply, copies of every statement in the police investigation file, and Malaysians will be more reluctant to come forward with evidence to incriminate their fellows.

To sum up, the answer to the two questions as limited during the course of arguments is this — when a prosecution witness is being cross-examined, and the defence proposes to impeach his credit, the court, should, on the request of the defence, refer to his police statement and may then, if the court thinks it expedient in the interest of justice, direct the defence to be supplied with a copy.

Our conclusion is not inconsistent with judgment of Syed Othman F.J. in *Husdi* v. *Public Prosecutor*,[2] out of which arises this reference, which dealt with the wider question whether or not the defence is entitled in advance of the trial to copies of police statements of prosecution witnesses, and which he answered in the negative, which answer was not challenged before us.

Questions answered.

Solicitors: *Sri Ram & Co.*

K. MURUGESU v. NADARAJAH

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.JJ.) March 13 & 31, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 205 of 1978]

Contract — Consideration — Mutual Promises — Contracts Act, 1950, s. 24.

In this case the appellant had agreed to sell a house to the respondent for $26,000. The respondent obtained an order of specific performance of the agreement and the appellant appealed. At the appeal, counsel for the appellant submitted that there was no consideration for the offer to sell and the agreement was void as being without consideration.

Held: it is clear from illustration (a) to section 24 of the Contracts Act, 1950, that consideration can consist of mutual promises and the contention that there was no consideration in this case was entirely unfounded.

Cases referred to:-

(1) *Mohamed Syedol Ariffin* v. *Yeoh Ooi Gark* [1916] 2 A.C. 575; 1 M.C. 165.

(2) *Harrison* v. *Cage* (1698) 12 Mod. 214.

FEDERAL COURT.

S.K. Lingam for the appellant.

S. Selvaratnam for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): This is an appeal from the decision of the High Court to order specific performance of an agreement in writing by which the appellant agreed to sell his house to the respondent who was at all times his tenant but who being greatly desirous of owning the house in which he had resided for so long had pestered the landlord into selling it to him.

The agreement is on a scrap of paper on which the appellant had written:

"2nd January, 1972.

I agree to sell my house No. 71 erected on Lot 7612 held under C.T. 16432 to Mr. A. Nadarajah, the present tenant, of the house at $26,000 (Dollars twenty six thousand only) within three months from date.

Sgd.
Registered Owner."